

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Steven Luckenbill,

Petitioner,

v.

Colette Peters, et al.,

Respondents.

No. CV-23-02462-PHX-SRB (DMF)

REPORT AND RECOMMENDATION

**TO THE HONORABLE SUSAN R. BOLTON, SENIOR UNITED STATES
DISTRICT JUDGE:**

This 28 U.S.C. § 2241 habeas matter is on referral to the undersigned for further proceedings and a report and recommendation pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure (Doc. 7 at 3).¹ Undersigned has carefully reviewed the entire record in this matter in light of the applicable law. As set forth below, this matter fails on the merits without the need for an evidentiary hearing on this sufficiently developed record.

I. THESE HABEAS PROCEEDINGS

In November 2023, Petitioner Steven Luckenbill (“Petitioner”) filed a *pro se* petition initiating this 28 U.S.C. § 2241 habeas matter (“Petition”) (Doc. 1). At the time of filing the Petition, Petitioner was confined in the Federal Correctional Institution-Phoenix (“FCI-Phoenix”) (*Id.*). Petitioner is serving a 91-month term of imprisonment for

¹ Citation to the record as “Doc.” indicates documents as displayed in the official Court electronic document filing system maintained by the District of Arizona under Case No. CV-23-02462-PHX-SRB (DMF).

1 possession with the intent to distribute methamphetamine in violation of the United States
2 criminal code imposed by the United States District Court for the District of Colorado in
3 November 2021 (Doc. 1 at 1-2; Doc. 5 at 10-12; Doc. 15-2 at 4-5, ¶ 17; Doc. 15-2 at 26-
4 32).

5 On February 2, 2024, the Court dismissed the Petition without prejudice for
6 Petitioner's failure to use a court-approved form, and the Court granted leave to file an
7 amended petition within 30 days (Doc. 4). Petitioner timely filed an amended petition
8 ("Amended Petition") (Doc. 5). The Amended Petition named the Director of the Bureau
9 of Prisons as Respondent (*Id.* at 1). In the Amended Petition, Petitioner claims that the
10 Bureau of Prisons ("BOP" or "Bureau") incorrectly calculated his sentence (*Id.* at 1-23).
11 Petitioner argues that BOP failed to properly credit Petitioner pursuant to 18 U.S.C. § 3585
12 for the period from May 6, 2020, through November 2, 2021, when Petitioner asserts that
13 he was housed in a federal facility in pretrial proceedings regarding federal criminal
14 charges (*Id.*). Petitioner asserts that he exhausted available administrative remedies before
15 filing these proceedings (*Id.* at 9).

16 On April 19, 2024, the Court substituted the unnamed Warden of FCI-Phoenix as
17 Respondent and ordered Respondent to answer the Amended Petition (Doc. 7 at 1-3). The
18 Court also ordered:

19 Petitioner must file and serve a notice of a change of address in accordance
20 with Rule 83.3(d) of the Local Rules of Civil Procedure. Petitioner must not
21 include a motion for other relief with a notice of change of address. Failure
22 to comply may result in dismissal of this action.

(*Id.* at 2).

23 On June 12, 2024, Respondent filed a timely Return and Answer to Amended
24 Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 ("Answer") (Doc. 15). In the
25 Answer, Respondent argues that the Petitioner's claim should be dismissed as
26 administratively unexhausted and that Petitioner's claim fails on the merits (*Id.*).

27 Petitioner timely replied in support of the Amended Petition (Doc. 19).

28 Upon review of the Amended Petition and briefing thereon (Docs. 5, 15, 19), the

1 Court set oral argument (Doc. 21). At and following oral argument, the Court ordered
 2 Respondent to supplement the record and allowed the parties additional written argument
 3 based on such (Docs. 22, 24, 26). Supplements were filed by Respondent and served on
 4 Petitioner (Docs. 23, 28, 29). Petitioner did not respond to the supplements.

5 **II. EXHAUSTION BEFORE 28 U.S.C. § 2241 PETITION**

6 **A. Legal Framework**

7 Federal inmates can pursue habeas corpus relief in two forms. A challenge to a
 8 federal prisoner's conviction or sentence can be raised via a motion to vacate, set aside, or
 9 correct the sentence pursuant to 28 U.S.C. § 2255. A habeas petition challenging the
 10 "manner, location, or conditions of a sentence's execution" must be brought pursuant to 28
 11 U.S.C. § 2241. *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). These
 12 proceedings were properly brought pursuant to 28 U.S.C. § 2241. Petitioner's claim
 13 regards the "manner, location, or conditions" of the execution of Petitioner's sentence of
 14 imprisonment for possession with the intent to distribute methamphetamine in violation of
 15 the United States criminal code imposed by the United States District Court for the District
 16 of Colorado (*see* Docs. 1, 5, 7, 15).

17 As a general matter, an inmate must exhaust available administrative remedies
 18 before filing a lawsuit. *Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012).
 19 Nevertheless, administrative exhaustion is not statutorily required by 28 U.S.C. § 2241.
 20 *See Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004) (citing *McKart v. United States*,
 21 395 U.S. 185, 194 (1969)). However, courts generally require that administrative remedies
 22 be exhausted before 28 U.S.C. § 2241 proceedings because it is usually more efficient for
 23 the administrative process to go forward without interruption than to permit parties to seek
 24 aid from the courts at various intermediate stages. *Id.*; *see also* *McKart*, 395 U.S. at 194.
 25 As explained by the Ninth Circuit in *Laing*:

26 Under the doctrine of exhaustion, "no one is entitled to judicial relief for a
 27 supposed or threatened injury until the prescribed ... remedy has been
 28 exhausted." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23
 L.Ed.2d 194 (1969) (citation and internal quotation marks omitted).

1 Exhaustion can be either statutorily or judicially required. If exhaustion is
2 required by statute, it may be mandatory and jurisdictional, but courts have
3 discretion to waive a prudential requirement. *El Rescate Legal Servs., Inc. v.*
4 *Executive Office of Immigration Review*, 959 F.2d 742, 746 (9th Cir.1991);
5 *Stratman v. Watt*, 656 F.2d 1321, 1325–26 (9th Cir.1981).

370 F.3d at 997-98.

6 Courts may require prudential exhaustion if “(1) agency expertise makes agency
7 consideration necessary to generate a proper record and reach a proper decision; (2)
8 relaxation of the requirement would encourage the deliberate bypass of the administrative
9 scheme; and (3) administrative review is likely to allow the agency to correct its own
10 mistakes and to preclude the need for judicial review.” *Noriega-Lopez v. Ashcroft*, 335
11 F.3d 874, 881 (9th Cir. 2003) (quoting *Montes v. Thornburgh*, 919 F.2d 531, 537 (9th Cir.
12 1990)). Even when exhaustion is prudential and courts have discretion to waive the
13 exhaustion requirement, a key consideration in exercising this discretion is whether
14 waiving the exhaustion requirement encourages the inmate to bypass the administrative
15 scheme. *Laing*, 370 F.3d at 1000.

16 When a petitioner does not exhaust administrative remedies and administrative
17 remedies remain available, “a district court ordinarily should either dismiss the petition
18 without prejudice or stay the proceedings until the petitioner has exhausted remedies,
19 unless exhaustion is excused.” *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir.
20 2011). However, exhaustion may be excused if pursuing an administrative remedy would
21 be futile. *Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993); *see also Sun*
22 *v. Ashcroft*, 370 F.3d 932, 943 (9th Cir. 2004) (reiterating that exhaustion is futile when
23 the agency's position on the issue appears “already set” and is unlikely to change).

24 If a prisoner is unable to obtain an administrative remedy because of his failure to
25 administratively appeal in a timely manner, then the petitioner has procedurally defaulted
26 his habeas corpus claim. *See Nigro v. Sullivan*, 40 F.3d 990, 997 (9th Cir. 1994) (citing
27 *Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990)); *Martinez v. Roberts*, 804 F.2d 570,
28 571 (9th Cir. 1986)). If a claim is procedurally defaulted, the court may require the
petitioner to demonstrate cause for the procedural default and actual prejudice from the

1 alleged violation of law. *See Francis*, 894 F.2d at 355 (suggesting that the cause and
 2 prejudice test is the appropriate test); *Murray v. Carrier*, 477 U.S. 478, 492 (1986)
 3 (applying cause and prejudice test to procedural defaults on appeal); *Hughes v. Idaho State*
 4 *Bd. of Corr.*, 800 F.2d 905, 906–08 (9th Cir. 1986) (applying cause and prejudice test to
 5 pro se litigants).

6 The BOP has an administrative remedy program for inmates who want to seek
 7 formal review of an issue relating to any aspect of confinement. 28 C.F.R. §§ 542.10 &
 8 542.14(d)(2); *see also* Doc. 15-1 at 3-5, ¶¶ 3-9 (summary of Administrative Remedy
 9 Program). The BOP’s Administrative Remedy Program consists of four levels of review:
 10 an attempt at informal resolution initiated by form BP-8, a request to the Warden initiated
 11 by form BP-9, an appeal to the Regional Director initiated by form BP-10, and an appeal
 12 to the Office of General Counsel in the Central Office initiated by form BP-11 (Doc. 15-1
 13 at 3, ¶ 4). An inmate may not raise in an appeal an issue that was not raised in the lower
 14 levels. *See* 28 C.F.R. § 542.15(b)(2). The regulations permit the Administrative Remedy
 15 Coordinator at any level to reject and return to the inmate without response a request for
 16 administrative remedy or appeal that does not meet procedural requirements outlined in the
 17 Code of Federal Regulations. *See* 28 C.F.R. § 542.17(a). Nevertheless, the inmate shall
 18 be provided a written notice of rejection, signed by the Administrative Remedy
 19 Coordinator, explaining the reason for rejection. *See* 28 C.F.R. § 542.17(b). “If the defect
 20 on which the rejection is based is correctable, the notice shall inform the inmate of a
 21 reasonable time extension within which to correct the defect and resubmit the Request or
 22 Appeal.” 28 C.F.R. § 542.17(b).

23 **B. Analysis**

24 Respondent claims that Petitioner did not exhaust his administrative remedies
 25 before filing these proceedings because of procedural deficiencies in Petitioner’s attempts
 26 to exhaust (Doc. 15 at 7; Doc. 15-1 at 6-7, ¶¶ 13-15). Specifically, Respondent asserts that:

27 Here, Petitioner never properly filed the final level of Administrative
 28 Remedies, to the Office of General Counsel (BP-11), prior to filing the

1 Amended Petition. (Ex. A [Doc. 15-1] at ¶¶ 12-14.) While he filed a BP-11,
 2 he did not wait for the response from the BP-10 before filing his BP-11,
 3 which is improper. (*Id.*)

4 (Doc. 15 at 7). Respondent requests that this Court dismiss these proceedings for failure
 5 to administratively exhaust (*Id.* at 8). However, Respondent's assertions about defects in
 6 Petitioner's administrative exhaustion are not entirely accurate or complete. Also, the
 7 record in this matter reflects that further attempts by Petitioner to exhaust his administrative
 8 remedies would be futile.

9 The April 29, 2024, declaration of a BOP employee Shaleen Ruelas ("Legal
 10 Assistant Ruelas") on which Respondent relies attaches the BOP's computer records
 11 regarding Petitioner's requests for BOP administrative remedies and responses thereto
 12 ("SENTRY Administrative Remedy Index") (Doc. 15-1 at 9-14). The Administrative
 13 Remedy number assigned to Petitioner's requests for administrative relief regarding the
 14 issue raised by the habeas claim in this matter is 1143936 (Doc. 15-1 at 4, ¶ 7; Doc. 15-1
 15 at 5, ¶ 13). The SENTRY Administrative Remedy Index in Administrative Remedy
 16 number 1143936 reflects the BOP's denial of Petitioner's BP10 on April 10, 2023 (Doc.
 17 15-1 at 14). Legal Assistant Ruelas's April 29, 2024, declaration implies that the
 18 documents in attachment 4 to the declaration are all of the BOP administrative remedy
 19 requests and responses for Administrative Remedy number 1143936 (Doc. 15-1 at 7 ("Att.
 20 4, Remedy No. 1143936")). Nevertheless, Legal Assistant Ruelas's April 29, 2024,
 21 declaration does not reflect or account for the BOP's April 10, 2023, denial of the BP10
 22 shown on the SENTRY Administrative Remedy Index submitted in support of the
 23 declaration (Doc. 15-1 at 6, ¶ 13; Doc. 15-1 at 7, 14, 27-34).

24 To his filings in this matter, Petitioner attached some of his requests for
 25 administrative relief and the BOP responses for Administrative Remedy number 1143936
 26 (*see, e.g.*, Docs. 1, 5, 19). Included in the attachments to the Petition initiating this matter
 27 was the BOP's April 10, 2023, denial of Petitioner's BP10 in Administrative Remedy
 28 number 1143936 (Doc. 1-1 at 13).² While the April 10, 2023, BP10 denial was reflected

² The Court recognizes that an amended petition supersedes an original petition. *Ferdik v.*

1 the SENTRY Administrative Remedy Index, such BP10 denial was not included in
2 Respondent's Answer materials (Doc. 15-1 at 7-34).

3 Consistent with the SENTRY Administrative Remedy Index reflecting the April 10,
4 2023, BP10 denial attached to Legal Assistant Ruelas's April 29, 2024, declaration, the
5 April 10, 2023, denial in Administrative Remedy number 1143936 was substantive, not
6 procedural (Doc. 15-1 at 14; Doc. 1-1 at 13). Further, the April 10, 2023, denial of the
7 BP10 in Administrative Remedy number 1143936 stated that if Petitioner was dissatisfied
8 with the BP10 decision, Petitioner must file an appeal to the Office of General Counsel in
9 the Central Office, which is a BP11, "within 30 calendar days of the date of this response"
10 (Doc. 1-1 at 13; Doc. 15-1 at 3, ¶ 4). *See* 28 C.F.R. § 542.15 ("An inmate who is not
11 satisfied with the Regional Director's response may submit an Appeal on the appropriate
12 form (BP-11) to the General Counsel within 30 calendar days of the date the Regional
13 Director signed the response."). Petitioner's copy of the BP10 decision in Administrative
14 Remedy number 1143936 reflects a received date of May 31, 2023, which is after the time
15 for a BP11 submission had already passed (Doc. 1-1 at 13). While Petitioner could have
16 sought permission to submit the BP11 outside of the timeframe for good cause, he was not
17 required to wait and seek such relief. *See* 28 C.F.R. § 542.15 ("When the inmate
18 demonstrates a valid reason for delay, these time limits may be extended."); 28 C.F.R. §
19 542.18 ("If the inmate does not receive a response within the time allotted for reply,
20 including extension, the inmate may consider the absence of a response to be a denial at
21 that level.").

22 Indeed, the March 8, 2023, receipt for Petitioner's BP10 administrative appeal in
23 Administrative Remedy number 1143936 states that Petitioner's BP10 was received on
24 March 7, 2023, with response by BOP's Regional Director due on April 6, 2023 (Doc. 1-1

25 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios, Inc. v. Richard Feiner*
26 *& Co.*, 896 F.2d 1542, 1546 (9th Cir. 1989). Further, any ground for relief that was raised
27 in the original petition is waived if it is not alleged in an amended petition. *Lacey v.*
28 *Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc). Nevertheless, Respondent's
incomplete account and record submitted in support of Respondent's exhaustion argument
require the Court to consider the attachments to the Petition, which were readily available
to Respondent, to decide the exhaustion issue.

1 at 26; Doc. 5 at 19). *See* 28 C.F.R. § 542.18. On April 16, 2023, apparently having not
2 received the BOP's April 10, 2023, response substantively denying his BP10, Petitioner
3 submitted a BP11 in Administrative Remedy number 1143936 (Doc. 15-1 at 32; Doc. 19-
4 1 at 3). The BP11 reflects it was signed by Petitioner on April 16, 2023, and received by
5 the Office of General Counsel in the Central Office on May 4, 2023 (*Id.*). In the BP11,
6 Petitioner states that the response to the BP10 was due on April 6, 2023, it was beyond that
7 date, and Petitioner had not received a BP10 response (*Id.*).

8 The SENTRY Administrative Remedy Index reflects that Petitioner submitted a
9 BP11 in Administrative Remedy number 1143936 on May 4, 2023 (Doc. 15-1 at 14), and
10 that one of the reasons that the BP11 was rejected by the BOP on May 8, 2023, was because
11 the "BP10 RESPONSE IS PENDING" (*Id.*). Yet, the BP10 response in Administrative
12 Remedy number 1143936 was not pending on May 4, 2023, or on May 8, 2023; rather, the
13 BP10 response substantively denying Petitioner's BP10 in in Administrative Remedy
14 number 1143936 had already been issued on April 10, 2023 (Doc. 15-1 at 14; Doc. 1-1 at
15 13).

16 Citing 28 C.F.R. § 542.18, Petitioner argues that he did properly exhaust his
17 administrative remedies with BOP, including to the Office of General Counsel in the
18 Central Office in submitted his BP11 on April 16, 2023, such that it was received on May
19 4, 2023 (Doc. 19 at 3). 28 C.F.R. § 542.18 states:

20 If accepted, a Request or Appeal is considered filed on the date it is logged
21 into the Administrative Remedy Index as received. Once filed, response shall
22 be made by the Warden or CCM within 20 calendar days; by the Regional
23 Director within 30 calendar days; and by the General Counsel within 40
24 calendar days. If the Request is determined to be of an emergency nature
25 which threatens the inmate's immediate health or welfare, the Warden shall
26 respond not later than the third calendar day after filing. If the time period
27 for response to a Request or Appeal is insufficient to make an appropriate
28 decision, the time for response may be extended once by 20 days at the
institution level, 30 days at the regional level, or 20 days at the Central Office
level. Staff shall inform the inmate of this extension in writing. Staff shall
respond in writing to all filed Requests or Appeals. If the inmate does not
receive a response within the time allotted for reply, including extension, the

1 inmate may consider the absence of a response to be a denial at that level.

2 The Court concludes that the record in this matter reflects that at the very least,
3 Petitioner made good faith and diligent attempts to exhaust his administrative remedies in
4 compliance with the BOP's administrative remedy system. Arguably, Petitioner properly
5 exhausted his BOP administrative remedies. In any event, the record reflects that the BOP
6 was given a sufficient opportunity to administratively address Petitioner's claim at every
7 administrative level. Waiver of the exhaustion requirement in these circumstances does
8 not encourage Petitioner or other inmates to bypass the BOP's administrative scheme.
9 Additionally, the course of the administrative remedy process as well as this litigation,
10 procedurally and substantively, demonstrates that it would have been futile for Petitioner
11 to make additional attempts to exhaust his administrative remedies at the highest level, to
12 the BOP's Office of General Counsel in the Central Office, as Respondent claims Petitioner
13 failed to do. The administrative process did not develop a sufficient record; rather, it took
14 multiple orders from this Court for such record development.

15 For the reasons set forth above, it is recommended that Respondent's request that
16 the Amended Petition be dismissed for failure to exhaust administrative remedies be
17 rejected. Below, the merits of the claim in the Amended Petition will be addressed.

18 **III. MERITS**

19 A habeas petition challenging the "manner, location, or conditions of a sentence's
20 execution" must be brought pursuant to 28 U.S.C. § 2241. *Hernandez*, 204 F.3d at 864.
21 Here, the claim alleged in these 28 U.S.C. § 2241 proceedings regards the "manner,
22 location, or conditions" of the execution of Petitioner's sentence (Doc. 5). Although a
23 district court has no jurisdiction over the BOP's discretionary designation decisions, it does
24 have jurisdiction in 28 U.S.C. § 2241 proceedings to decide whether the Bureau of Prisons
25 acted contrary to established federal law, violated the Constitution, or exceeded its
26 statutory authority. *Compare Reeb v. Thomas*, 636 F.3d 1224, 1228 (9th Cir. 2011)
27 (finding no jurisdiction to review BOP action absent an alleged violation of federal law),
28 *with Close v. Thomas*, 653 F.3d 970, 973–74 (9th Cir. 2011) (allowing judicial review for

1 BOP action which allegedly exceeded its statutory authority).

2 Here, Petitioner claims that pursuant to the plain language of 18 U.S.C. § 3585, BOP
3 should have applied credit towards Petitioner's sentence for the time that Petitioner asserts
4 that he was housed in a federal facility during pretrial proceedings for federal criminal
5 charges from May 6, 2020, through November 2, 2021 (Docs. 5, 19). Section 3585 of Title
6 18 of the United States Code governs calculation of a term of imprisonment imposed as a
7 federal criminal sentence, including when a term of imprisonment commences. This
8 section provides:

9
10 **(a) Commencement of sentence.**--A sentence to a term of imprisonment
11 commences on the date the defendant is received in custody awaiting
12 transportation to, or arrives voluntarily to commence service of sentence at,
the official detention facility at which the sentence is to be served.

13 **(b) Credit for prior custody.**--A defendant shall be given credit toward the
14 service of a term of imprisonment for any time he has spent in official
detention prior to the date the sentence commences--

15 **(1)** as a result of the offense for which the sentence was imposed; or

16 **(2)** as a result of any other charge for which the defendant was arrested
17 after the commission of the offense for which the sentence was
18 imposed;

19 that has not been credited against another sentence.

20
21 18 U.S.C. § 3585. Petitioner argues that as a matter of law it does not matter that he was
22 serving a state sentence when he was transferred to a federal facility for pretrial proceedings
23 pertaining to his federal case for which Petitioner is now serving the sentence (Doc. 19 at
24 1-3). In support of his arguments, Petitioner also asserts that a state of Colorado criminal
25 case resentencing affected whether or not the time period from May 6, 2020, through
26 November 2, 2021, was credited to his state of Colorado sentences (Doc. 5 at 10-14; *see*
27 *also* Doc. 19 at 1-3). In addition, Petitioner argues that the state of Colorado judge ordered
28 his state sentences to run concurrent to his federal sentence he is now serving, impacting

1 his federal sentence calculation (Doc. 5 at 12; Doc. 19 at 3). Nevertheless and despite any
 2 assertion by Petitioner to the contrary (Doc. 5 at 12-13), the United States District Judge
 3 imposed the federal sentence at issue to run consecutive to Petitioner's state sentences of
 4 imprisonment: "The defendant is hereby committed to the custody of the Federal Bureau
 5 of Prisons to be imprisoned for a total term of: **ninety-one (91) months**, consecutive to
 6 any state sentence the defendant is currently serving" (Doc. 15-2 at 27).

7 In answering the Amended Petition, Respondent asserts that from June 5, 2020,
 8 through November 22, 2021, Petitioner was in federal custody pursuant to a writ of habeas
 9 corpus *ad prosequendum* (Doc. 15 at 3-4; Doc. 15-2 at 4-5, ¶¶ 16-18). In support,
 10 Respondent attaches the writ of habeas corpus *ad prosequendum*, which reflects a date of
 11 June 5, 2020 (Doc. 15-2 at 23-24). Regardless of the exact date Petitioner was transferred
 12 for his federal pretrial proceedings pursuant to the writ of habeas corpus *ad prosequendum*,
 13 Respondent argues that Petitioner remained in primary Colorado state custody during the
 14 period Petitioner was in federal custody pursuant to a writ of habeas corpus *ad*
 15 *prosequendum* and that such period cannot be applied as credit toward the current federal
 16 sentence Petitioner is serving (Doc. 15 at 8-10). Respondent accurately summarizes the
 17 applicable law:

18 Federal law, specifically 18 U.S.C. § 3585(a)-(b), dictates the date on which
 19 a federal sentence commences and controls whether time spent in custody
 20 prior to the commencement date can be applied to the sentence. The Attorney
 21 General, through the Bureau, is responsible for computing the amount of
 22 prior custody credit an inmate is to receive toward his federal sentence.
 23 (*United States v. Wilson*, 503 U.S. 329, 333-35 (1992); *see also* 28 C.F.R. §
 24 0.96 (authorizing the Director of the Bureau to exercise any authority of the
 25 Attorney General relating to the commitment, control, or treatment of
 26 persons charged with or convicted of offenses against the United States).)
 27 This sentence computation occurs once the defendant commences his federal
 28 sentence, rather than necessarily at the time of sentencing. (*Wilson*, 503 U.S.
 at 333.) Title 18 U.S.C. § 3585 controls the calculation of Petitioner's
 sentence in this case.

Courts look to whether the state or federal government has "primary
 jurisdiction" over the offender to determine when an offender is "received"

1 by the Attorney General for service of his sentence. Primary jurisdiction
2 determines the priority of custody and service of sentence as between state
3 and federal sovereigns. (*Taylor v. Reno*, 164 F.3d 440, 444 n.1 (9th Cir.
4 1998).)

5 The sovereign which first arrests the offender has primary jurisdiction over
6 the offender unless that sovereign relinquishes jurisdiction to another by
7 releasing him from its custody “by, *e.g.*, bail release, dismissal of the state
8 charges, parole release, or expiration of the sentence.” *Chambers v. Holland*,
9 920 F. Supp. 618, 622 (M.D. Pa.), *aff’d*, 100 F.3d 946 (3d Cir. 1996). A
10 transfer pursuant to a writ of habeas corpus *ad prosequendum* does not
11 relinquish primary jurisdiction. (*Thomas v. Brewer*, 923 F.2d 1361, 1366-67
12 (9th Cir. 1991) (state authorities did not abandon primary jurisdiction when
13 they transferred defendant to federal custody pursuant to a writ of habeas
14 corpus *ad prosequendum*); *United States v. Evans*, 159 F.3d 908, 912 (4th
15 Cir. 1998) (federal sentence does not begin to run when prisoner in state
16 custody is produced for prosecution pursuant to a writ of habeas corpus *ad*
17 *prosequendum*, as state retains primary jurisdiction over prisoner until
18 prisoner satisfies state obligation).)

19 (Doc. 15 at 8-9).

20 Indeed, more recent Ninth Circuit caselaw than the caselaw cited by Respondent
21 supports Respondent’s position and argument. In *Johnson v. Gill*, 883 F.3d 756 (9th Cir.
22 2018), the Ninth Circuit held that where a defendant is transferred from one sovereign to
23 another, primary jurisdiction has only shifted when the state with primary jurisdiction
24 “intended to surrender its priority upon transfer,” but not when the state has “merely
25 transferred temporary control of the defendant to the federal government.” *Id.* at 765; *see*
26 *also Schleining v. Thomas*, 642 F.3d 1242, 1243 n.1 (9th Cir. 2011) (“[T]he temporary
27 transfer of a prisoner from state prison to the BOP’s custody for purposes of a federal
28 prosecution does not interrupt his state custody.”); *Reynolds v. Thomas*, 603 F.3d 1144,
1152 (9th Cir. 2010) (noting that a defendant’s appearance before a federal court pursuant
to a writ of *habeas corpus ad prosequendum* indicates that the state had primary
jurisdiction), *abrogated on other grounds by Setser v. United States*, 566 U.S. 231 (2012).

Long established law remains in force and effect: the transfer of a defendant
pursuant to a writ of habeas corpus *ad prosequendum* allows one sovereign to “loan” the

1 defendant to another sovereign for the purpose of prosecution. *Thomas*, 923 F.2d at 1367.
 2 A “loan” in this context indicates that the sending sovereign expected the receiving
 3 sovereign to return the defendant following that defendant’s prosecution. *Id.* The nature
 4 of this transfer does not relinquish primary jurisdiction over the defendant, as it merely
 5 constitutes a transfer of “temporary control.” *Johnson*, 883 F.3d at 765.

6 On this sufficiently developed record, Respondent is correct that Petitioner was in
 7 Colorado’s primary jurisdiction from May 6, 2020, through November 2, 2021, despite
 8 Petitioner having been in federal temporary control pursuant to a writ of habeas corpus *ad*
 9 *prosequendum*, whether for all of that time period or beginning on June 5, 2020.³
 10 Petitioner’s arguments that he was in federal primary custody from May 6, 2020, through
 11 November 2, 2021, fail (Doc. 5; Doc. 19 at 2-3).

12 Petitioner was released from Colorado state custody to United States Marshal
 13 custody on March 29, 2022 (Doc. 15-2 at 5, ¶ 19) to begin state of Colorado parole on
 14 March 30, 2022 (Doc. 19-1 at 1; Doc. 29-1 at 2-4). Respondent concedes that the BOP
 15 obtained exclusive custody of Petitioner on March 29, 2022 (Doc. 15 at 4-5; Doc. 15-2 at
 16 5, ¶ 19). Regardless of which jurisdiction had primary custody from May 6, 2020, through
 17 November 2, 2021, Respondent also agrees with Petitioner that “any time Petitioner spent
 18 in official detention prior to March 29, 2022, may be applied to his sentence, as long as
 19 such time has not been applied to any other sentence” (*Id.* at 9). Nevertheless, the Court’s
 20 careful review of the record in this matter, including the ordered supplements, satisfies the
 21 Court that Petitioner was credited for all of his official detention prior to March 29, 2022,
 22 to his Colorado state court sentences (Doc. 29-1 at 2-4; *see also* Doc. 5 at 18; Doc. 15-2 at
 23 39). This is consistent with Respondent’s position (Docs. 15, 23; *see also* Doc. 29).

24 Petitioner’s state resentencing in April 2022 did not change this result (Doc. 29-1 at
 25 2-4; *see also* Doc. 5 at 18; Doc. 15-2 at 39). The state of Colorado official time

26
 27 ³ Respondents have provided reliable documentation that Petitioner was in federal
 28 temporary custody pursuant to a writ of habeas corpus *ad prosequendum* from June 5,
 2020, through November 22, 2021 (Doc. 15-2 at 4-5, ¶¶ 16-18; Doc. 15-2 at 23-24), rather
 than the timeframe Petitioner asserts, which was from May 6, 2020, to November 2, 2021.
 In any event, the date range discrepancy does not affect the analysis or outcome.

1 computation report after Petitioner's state of Colorado resentencing reflects that after
2 Petitioner's state resentencing in April 2022, Petitioner was still credited for state of
3 Colorado incarceration sentences until March 30, 2022 (Doc. 29-1 at 2-4). Indeed, this
4 comports with the sentences Petitioner received in state of Colorado cases which were not
5 subject to the April 2022 resentencing (Doc. 29-1 at 2-4; *see also* Doc. 5 at 18; Doc. 15-2
6 at 3-5, 13-17, 39). Further, United States district court judges have the discretion to order
7 sentences consecutive to sentences already imposed. *See Setser*, 566 U.S. at 236. A state
8 judge's order that state sentences run concurrent to federal sentences does not override the
9 federal court's order that a federal sentence be consecutively served. *See Taylor v. Sawyer*,
10 284 F.3d 1143, 1149 (9th Cir. 2002), *abrogated on other grounds by Setser*, 566 U.S. at
11 244. Thus, Petitioner's argument that his state of Colorado resentencing impacted time
12 credits for Petitioner's federal sentence fails (Doc. 5 at 12; Doc. 19 at 3).

13 For the reasons set forth above, Petitioner's claim in the Amended Petition fails on
14 the merits and the Amended Petition should be denied.

15 **IV. CONCLUSION**

16 The claim in the Amended Petition (Doc. 5) should proceed to the merits rather than
17 be dismissed as administratively unexhausted. Nevertheless, the claim in the Amended
18 Petition fails on the merits based on this sufficiently developed record. Thus, the Amended
19 Petition should be denied without an evidentiary hearing, and this matter should be
20 terminated.

21 Accordingly,

22 **IT IS RECOMMENDED** that Petitioner Steven Luckenbill's Amended Petition
23 (Doc. 5) be denied and that the Clerk of Court be directed to terminate this matter.

24 This recommendation is not an order that is immediately appealable to the Ninth
25 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal
26 Rules of Appellate Procedure should not be filed until entry of the District Court's
27 judgment. The parties shall have fourteen days from the date of service of a copy of this
28 recommendation within which to file specific written objections with the Court. *See* 28

1 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which
2 to file responses to any objections. Failure to file timely objections to the Magistrate
3 Judge's Report and Recommendation may result in the acceptance of the Report and
4 Recommendation by the District Court without further review. *See United States v. Reyna-*
5 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual
6 determination of the Magistrate Judge may be considered a waiver of a party's right to
7 appellate review of the findings of fact in an order or judgment entered pursuant to the
8 Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72. Also, LRCiv 7.2(e)(3)
9 provides that "[u]nless otherwise permitted by the Court, an objection to a Report and
10 Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

11 Dated this 17th day of January, 2025.

12
13
14 
15 Honorable Deborah M. Fine
16 United States Magistrate Judge
17
18
19
20
21
22
23
24
25
26
27
28